A

TIONG SIEW MING

v.

PERBADANAN TABUNG PENDIDIKAN TINGGI NASIONAL

B

HIGH COURT SABAH & SARAWAK, SIBU
YEW JEN KIE J
[CIVIL APPEAL NO: 11A-2-2010]
22 JULY 2010

C

CIVIL PROCEDURE: *Appeal - Appealable decision, whether - Whether Magistrate's ruling on preliminary objection a 'decision' under Subordinate Courts Rules 1980, O. 49 r. 6 - Whether rights of parties determined*

D

CIVIL PROCEDURE: *Locus standi - Right to be legally represented - Claim pursuant to Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 for recovery of educational loan - Statute prohibiting private legal firms from representing Perbadanan Tabung Pendidikan Tinggi Nasional - Whether suit initiated through private legal firm a nullity - Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997, ss. 35, 38, 58*

E

CIVIL PROCEDURE: *Res judicata - Decision, finality of - Preliminary objection on whether legal representation was allowed, heard and dismissed by Magistrate - Whether decision final and appealable - Whether matter res judicata*

F

STATUTORY INTERPRETATION: *Construction of statutes - Intention of Parliament - Courts to ascertain legislative intent - Every word to bear some meaning - Parliament does not legislate in vain*

STATUTORY INTERPRETATION: *Construction of statutes - Rule of construction - Generalibus specialia derogant - Specific provision excludes operation of general provision*

G

The appellant/defendant appealed against the decision of the learned Magistrate in allowing the respondent/plaintiff's application for summary judgment. The sum of RM22,376.29 claimed by the respondent against the appellant was the outstanding educational loan facility granted by the

H

respondent to the appellant. The respondent had filed the summons through their solicitors Zaid Ibrahim & Co ('ZICO'). The filing of the action was after the insertion of the Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 ("the Act"). In light of the provision in s. 58 of the Act, it was argued for the appellant that ZICO as a private legal firm did not fall within the "persons" listed under s. 58 of the Act

I

as having authority to represent Perbadanan Tabung Pendidikan Tinggi Nasional ('PTPTN') in civil proceedings. Hence, the appellant claimed that the civil proceedings instituted by ZICO in the Magistrate's Court

was a nullity. The respondent contended that this side issue was *res judicata* because the same matter had been raised in the Magistrate's Court by way of preliminary issue and it had been dealt with and dismissed by the learned Magistrate. There was no appeal against the learned Magistrate's decision on the preliminary objection.

Held (allowing the appeal):

(1) The learned Magistrate's ruling on the preliminary objection did not fall within the word "decision" in O. 49 r. 6 of the Subordinate Courts Rules 1980 as it did not determine on the right of the parties. Hence, it was not appealable. Accordingly, the issue of *res judicata* did not arise; *Tetuan J & S Holding Sdn Bhd v. A Karim Hasan & Anor* (refd). (para 9)

(2) When construing an Act of Parliament, the court is to interpret the statute in order to ascertain legislative intent by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning for Parliament does not legislate in vain by using meaningless words and phrases; *Krishnadas Achutan Nair & Ors v. Maniyan Samykano* (refd). (para 13)

(3) The appointment of solicitors and advocates was confined to giving professional advice to PTPTN. Nothing in s. 38 gave authority to ZICO, a legal firm, to institute, appeal in and act for PTPTN in civil proceedings. (para 14)

(4) The principle governing the rule of construction expressed in the maxim *generalibus specialia derogant* is that where there are two provisions of written law, one general and the other specific, the special or specific provision excludes the operation of the general provision; *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* (refd). (para 15)

(5) Section 58 is a provision which specifically deals with conduct of civil proceedings and the person who could institute, appear in and conduct such proceedings and may make and do all appearances, acts and applications in respect of such proceedings on behalf of PTPTN. It excludes the general provision in s. 35 of the Act. Thus, ZICO had no authority to represent PTPTN in civil proceedings. As such, the civil proceedings instituted by ZICO in the Magistrate's Court was a nullity. (paras 16 & 17)

A ***Obiter:***

(1) Article 38 of the Sarawak Limitation Ordinance (Cap 49) provides for three years limitation period "For money payable for money lent". Thus, counting from 10 December 2002 (date of accrual of cause of action), the respondent should have commenced the action on or before 9 December 2005. Thus, the present action which was filed on 9 June 2008 was two years and six months out of time. The respondent's claim against the appellant was statute barred and ought to be dismissed. (para 38)

Case(s) referred to:
Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong [1984] 1 LNS 45 HC ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***
Pai Khek Meng v. Harbi Alan [2006] 7 CLJ 609 HC ***(refd)***
Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Limitation Ordinance (Sarawak), art. 38
Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997, ss. 23A, 35, 38, 58
Rules of the High Court 1980, O. 14, O. 26A
Subordinate Courts Rules 1980, O. 49 r. 6

For the appellant - Ben Lau; M/s Tang & Partners Advocates
For the respondent - Robert Jawan; M/s Zaid Ibrahim & Co

Reported by Amutha Suppayah

JUDGMENT

Yew Jen Kie J:

[1] This is the appellant's (defendant in the Magistrate's Court) appeal against the decision of the learned Magistrate in allowing the respondent's (plaintiff's in the Magistrate's Court) application for summary judgment by entering a judgment for the sum of RM22,376.29 as at 26 June 2007 with interest thereon at the rate of 8% per annum from 26 June 2007 to the date of full payment.

[2] The sum of RM22,376.29 claimed by the respondent's claim against the appellant is the outstanding educational loan facility granted by the respondent to the appellant.

[3] It is at the foremost in my mind that a hearing of O. 14 appeal is by way of rehearing. (see: *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182.

Side Issue

[4] At the outset, the appellant raised a side issue which had also been raised in the Magistrate's Court by way of preliminary objection, the same was dismissed by the learned Magistrate.

[5] It is to be noted that the respondent filed the initial summons on 9 June 2008 (amended and redated 16 April 2009) against the appellant through their appointed solicitors Zaid Ibrahim & Co ("ZICO"). The filing of the action was after the insertion of the Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 Act A1296 ("the Act") which came into force from 20 July 2007.

[6] Section 58 of the Act providing for conduct of civil proceedings, states:

> **58. Conduct of civil proceedings**
>
> Notwithstanding the provisions of any written law, in any civil proceedings by or against the Perbadanan.
>
> (a) Any person holding the appointment of Federal Counsel and authorized by the Attorney General for the purpose; or
>
> (b) Any officer of the Perbadanan authorized in that behalf by the chairman, may, on behalf of the Perbadanan, institute, appear in and conduct such proceedings and may make and do all appearances, acts and applications in respect of such proceedings.

[7] In light of the provision in s. 58 of the Act, it was argued for the appellant that ZICO as a private legal firm does not fall within the "persons" listed under s. 58 of the Act who has the authority to represent Perbadanan Tabung Pendidikan Tinggi Nasional ("PTPTN") in civil proceedings. Hence, the civil proceedings instituted by ZICO in the Magistrate's court is a nullity.

[8] In response, it was submitted for the respondent that this side issue is *res judicata* because the same matter had been raised in the Magistrate's court by way of preliminary issue and it has been dealt with and dismissed by the learned Magistrate. Since there was no appeal

against the learned Magistrate's decision on the preliminary objection and the appeal period has lapsed, the decision of the learned Magistrate thereon is final and binding on the parties to the action.

[9] I regret I do not agree with the respondent. In my opinion, the learned Magistrate's ruling on the preliminary objection does not fall within the word "decision" in O. 49 r. 6 of the Subordinate Courts Rules 1980 as it does not determine on the right of the parties. Hence, it was not appealable. (see, *Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor* [2000] 4 CLJ 152. Accordingly, the issue of *res judicata* does not arise.

[10] The respondent submitted the authority of ZICO to represent the respondent is based on s. 35 of the Act, which states:

> Appointment of agents, consultants, etc
>
> The Perbadanan may appoint or employ such agents, consultants including advocates and solicitors, or other persons to transact any business or to do any act required to be transacted or done in the execution of its functions or for the better carrying into effect the purposes of this Act.

[11] Emphasis was put on the words " ... consultants including advocates and solicitors ... to transact any business or to do any act required to be transacted or done in the execution of its function or for the better carrying into effect the purposes of this Act"

[12] A question is posed: does the foregoing words "consultants including advocates and solicitors" provide the power for the appointment of ZICO?

[13] It must be borne in mind that when construing an Act of Parliament, the court is to interpret the statute in order to ascertain legislative intent by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an act must bear some meaning for Parliament does not legislate in vain by using meaningless words and phrases. (*Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636, per Gopal Sri Ram JCA).

[14] In the *Words, Phrases & Maxims - Legally & Judicially Defined*, the word "consultant" is defined as "one who gives professional advice". From this definition it can be safely said that the appointment of solicitors and advocates is confined to giving professional advice to PTPTN. Nothing in s. 38 gives authority to ZICO, a legal firm, to institute, appeal in and act for PTPTN in civil proceedings.

[15] The principle governing the rule of construction expressed in the maxim *generalibus specialia derogant* is that where there are two provisions of written law, one general and the other specific, the special or specific provision excludes the operation of the general provision. (see: *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520).

[16] Section 58 is a provision which specifically deals with conduct of civil proceedings and the person who could institute, appear in and conduct such proceedings and may make and do all appearances, acts and applications in respect of such proceedings on behalf of PTPTN. It excludes the general provision in s. 35 of the Act. Thus, ZICO has no authority to represent PTPTN in civil proceedings.

[17] I find merits in this side issue. As such, the civil proceedings instituted by ZICO in the Magistrate's Court is a nullity.

Appeal Proper

[18] I shall for the completeness proceed to deal with the appeal proper.

Issue No. 1: The appellant did not owe the respondent the sum of RM22,376.29 as claimed by the respondent.

Issue No. 2: No particulars have been provided by the respondent as to how the sum of RM22,376.29 was arrived at.

[19] At the outset, I am compelled to disagree with the appellant's submission that in a summary application, the burden of proof is on the plaintiff to prove its case and to show that the action against the defendant is "virtually uncontested and incontestable.".

[20] The respondent's application in the present case is made under O. 26A (equivalent to O. 14 of the Rules of the High Court 1980) for summary judgment. The correct legal position is that the burden is upon the defendant to satisfy the court that there is an issue or question in dispute which ought for some other reason to be a trial of that claim. (Per Chong Siew Fai J in *Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong* [1984] 1 LNS 45.

[21] I opined these two issues are inter-related and can be dealt with together.

[22] For the appellant, it was contended that the respondent claimed for a sum of RM22,376.29 which comprised the principal sum of RM19,500 allegedly disbursed to the appellant and the rest are the administration costs of 4% per annum and incident costs as at 25 June 2007 (see, para. 5 of affidavit in reply affirmed by Nur Zulkarnain bin

A Che Azmi at p. 32 Record of Appeal). It was contended that the respondent has failed to set out how it derived the sum of RM22,376.29.

[23] It must be noted that the appellant did not dispute that an educational loan had been granted to her pursuant to the education loan agreement dated 13 August 1999. Nor did the appellant challenge the terms and conditions contained in the offer letter (exh. NZ1) and the education loan agreement (exh. NZ2 annexed to the affidavit in support).

[24] It is to be further noted that pursuant to the education loan agreement letter of offer, the respondent is entitled to charge administration costs at the rate of 4% per annum and accidental costs incurred. (see, item 1 of exh. NZ1 annexed to affidavit in support, p. 16 Record of Appeal).

[25] Given that the study loan is in the sum of RM19,500, the balance sum of RM2,876.29 (RM22,376.29 – RM19,500) must be for the administration costs of 4% per annum and incidental costs which the plaintiff is entitled to charge pursuant to the agreed terms in the offer letter and the education loan agreement.

[26] In the absence of averment that the calculation of the amount claimed is wrong, a mere averment as to how the respondent has arrived at the amount of claim could not constitute a triable issue which warrants the case to go for a full trial.

[27] I see no triable issue in issues no. 1 and no. 2.

Issue No. 3: Was The Sum Of RM19,500 Actually Disbursed?

[28] Learned counsel for the appellant had in his submission worked out a calculation based on exh. NZ3 to show that the respondent had only disbursed the principal sum of RM10,500 (rounded off figure) and not RM19,500 as claimed.

[29] In response, learned counsel for the respondent submitted – which, I concur - the purported simple mathematical calculation by the appellant's solicitors were never adduced in the affidavit evidence and was made from the bar. As such, no weight should be given to the allegation and it should be disregarded.

[30] In any event, it is clearly stated in the statement of account (exh. NZ3) under "jumlah pinjaman setahun" and "tempoh pinjaman" that the amount of loan was RM6,500 for three years totalling RM19,500. It also shows that a sum of RM19,500 had been granted to the appellant.

[31] I see no triable issue in issue no. 3.

Issue No. 4: Whether Excessive Administration Costs Was Imposed

[32] The issue raised herein is that the sum of RM22,876.29 is inclusive of the principal sum and the administrative costs plus incidental costs. The respondent prayed for interest at the rate of 4% per annum on the sum of RM22,876.20, which is imposition of interest upon interest. It was submitted that this imposition of compound interest contravenes the proviso (a) to s. 11 of the Civil Law Act 1956.

[33] I see no merits in this contention. It must be pointed out that the administration costs of 4% per annum which the respondent is claiming is pursuant to the agreed terms in the education loan agreement entered into between the appellant and the respondent.

[34] The appellant also raised issue that as the respondent had declared that the administration costs is to be charged at the rate of 1% per annum with effect from year 2009 and previously at 3% per annum, how come the respondent is still claiming administration costs at the rate of 4% per annum?

[35] I agree with learned counsel for the respondent that the appellant's reliance on the alleged reduced rate for administration costs is misconceived and unsubstantiated. This is because the offer letter (exh. NZ1) as well as the education loan agreement (exh. NZ2) have provided for the charging of administration costs at the rate of 4% per annum. Thus, the respondent is entitled to charge the same in the present case herein.

[36] I see no triable issue in issue no. 4.

Issue No. 5: Whether The Respondent's Claim Is Statute-Barred

[37] Learned counsel for the appellant submitted that the commencement of payment was 10 December 2002 and therefore the cause of action of this action began on 10 December 2002.

[38] Article 38 of the Sarawak Limitation Ordinance (Cap 49) provided for three years limitation period "for money payable for money lent". Thus, counting from 10 December 2002 (date of accrual of cause of action herein), the respondent should commence the action on or before 9 December 2005. Thus, the present action which was filed on 9 June 2008 is two years and six months out of time. Thus, the respondent's claim against the appellant is statute-barred and ought to be dismissed.

[39] It was further argued that s. 23A of the Act which provides 12 years limitation period from the date on which the cause of action accrued is of no help to the respondent. This is because s. 23A came into force only on 20 July 2007 and it is a fundamental principle of law that no statute shall be construed to have retrospective effect unless such a construction clearly appears in the terms of the Act.

[40] It was submitted that the question whether the plaintiff's claim is barred by limitation or not has given rise to a triable issue which is to be decided by the trial court. *Pai Khek Meng v. Harbi Alan* [2006] 7 CLJ 609 was cited in support.

[41] I regret I do not agree. It must be noted that the present action was filed on 9 June 2008 after the Act.

[42] Section 23A of the Act states;

> Notwithstanding the provisions of any written law, any action founded on a contract for educational loans shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

[43] The clear wordings in s. 23A has excluded the application of the Sarawak Limitation Act.

[44] I see no merit in the appellant's submission. My reason is this. If the present action had been filed before s. 23A came into force, then the amended Act would have no retrospective effect since there is no such provision in the Act. Since the respondent's action was filed after the coming into force of s. 23A, the issue of retrospective application does not arise.

[45] Hence, I see no triable issue in issue no. 5.

Conclusion

[46] Despite the fact that the appellant had failed to satisfy the court that there is a triable issue which ought to be tried in a trial court, the appeal would still be allowed on the ground that the action instituted and conducted by M/s Zaid Ibrahim & Co, Advocates in contravention of s. 58 of the Act is a nullity. No order as to costs.